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ABSTRACT

This report traces the movement for school funding reform in Colorado. The study analyzes how court-mandated remedies were implemented and seeks to determine what role public engagement played in these reforms. Some have suggested that a general skepticism and lack of confidence in reform in Colorado have delayed funding reform, coupled with such obstacles as strict limits on public spending and a strong desire for local control. Nevertheless, the combined effects of two lawsuits have brought some reforms to the state's school finance system, even without a major victory for the plaintiffs. One suit, "Lujan v. Colorado State Board of Education," addressed spending disparities among school districts. Although the plaintiffs lost this case, it was evident that the Justices of the Colorado Supreme Court agreed on the necessity of changing the state's educational finance laws. "Hafer v. Colorado State Board of Education" alleged a denial of adequate, rather than equal, educational opportunities under the state's revised educational finance law. There is also growing recognition that a statewide dialogue on education finance is critical. The latest legal challenges, especially "Giardino v. Colorado State Board of Education" with its focus on school building construction, may bring about this dialogue. (SLD)

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## Studies in Judicial Remedies and Public Engagement

# WHO'S IN CONTROL?:
## THE COURTS, THE LEGISLATURE AND THE PUBLIC IN COLORADO'S SCHOOL FINANCE DEBATE

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and

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**Campaign for Fiscal Equity, Inc.**

# Studies in Judicial Remedies and Public Engagement

Michael A. Rebell, Editor-in-Chief
Drew Dunphy, Executive Editor

This paper is one in a series of case studies of education finance litigations in various states. Through these studies, we hope to understand how court-ordered remedies were implemented and to determine what role, if any, public engagement processes played in these events. Specifically, we aim to test the hypothesis that reform initiatives are most likely to succeed in states where citizens have been involved in the remedial policy-making process. For that reason, the studies will encompass a wide range of reform experiences, including those where there was much public engagement and those where there was none.

The term "public engagement" is currently used to describe a wide range of activities. CFE's working definition of public engagement is a collaborative process in which a diverse range of individuals work together to arrive at solutions to complex social problems that a large majority of them can accept. Our hope is that this series of papers will help shape and refine our understanding of public engagement and its uses as a tool for change.

This series is made possible through the generous support of the Robin Hood Foundation and the Open Society Institute.

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# WHO'S IN CONTROL?: THE COURTS, THE LEGISLATURE AND THE PUBLIC IN COLORADO'S SCHOOL FINANCE DEBATE

by Christina Burnett
and Drew Dunphy[1]

## INTRODUCTION

Colorado's school finance story touches on a number of themes familiar to students of school finance litigation: a struggle between those supporting greater resources and those favoring lower taxes; a shift in focus from equity to adequacy; and the difficulty of fostering an informed, widespread dialogue on school finance given the complexity of the funding system. At the same time, certain factors particular to Colorado -- a seeming conflict in the state constitution, a number of strict constitutional amendments, and an unusually strong tradition of local control -- have dramatically shaped the state's reform process. With a pending lawsuit seeking to address the state's enormous capital construction needs, Colorado appears to be at a critical juncture in its school finance debate.

Since the early 1980s, Colorado has seen three school funding lawsuits and three Public School Finance Acts (PSFAs) aimed at resolving the state's

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education finance conflict. Although plaintiffs have yet to score a major victory and no court orders have been issued, this legal process has had a clear influence on legislative priorities and changes made to the funding system. Legislative hearings and other localized dialogues about funding reform have also had a subtle but important impact. Even before going to trial, the latest suit, *Giardino v. Colorado State Board of Education*, has already raised a sense of urgency among some legislators about solving the state's school funding problems.[2] In addition, advocates now perceive a pressing need for a broad statewide dialgoue on school finance. Coupled with the pressure of litigation, this momentum for a truly informed and widespread dialgoue may prove to be the missing link in Colorado's search for a funding remedy.

## BACKGROUND

### *Constitutional Clauses and the Theme of Local Control*

Many states would lay claim to a tradition of "local control," but this philosophy plays a particularly prominent role in Colorado politics, especially the politics of school finance. The strong orientation toward local political control has made questions about the state's obligation to fund educational adequacy even more complicated than in most states.[3] The root of this tension can perhaps be found in the Colorado Constitution, which in fact contains two clauses relevant to these issues: an "education" clause and

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[2] Addressing the inability of some districts to pay for construction, Senate President Tom Norton remarked, "If we don't address this, we're telling the courts to tell us to do our jobs, and that's wrong." *Needy Schools Seek a Lifeline from the State. Legislators Debate Involvement*, THE COLORADO SPRINGS GAZETTE, March 6, 1998 [hereafter *Needy Schools Seek a Lifeline*].

[3] For more on the complexity of balancing local control and statewide adequacy, *see* Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 NYU REV. L. & SOC. CHANGE 691, 714-718 (1994-95).

an "instruction" clause.[4] Article IX, § 2 of that document states that the General Assembly must "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state . . . ."[5] Article IX, § 15, however, vests control over instruction in district school boards:

> The General Assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their districts.[6]

Parties on both sides of Colorado's school funding debate have cited the state constitution to defend their positions regarding how the public school system should be governed and who bears the primary responsibility for funding it.

Over five decades before *Lujan v. Colorado State Board of Education*, the state's first fiscal equity suit, the Colorado Supreme Court provided an explanation of the term "maintenance" in Article IX, § 2 that would seem to place responsibility for school funding squarely on the state: "The establishment and financial maintenance of the public schools . . ." said the Court, "is the carrying out of a state and not a local or municipal purpose."[7] Despite this clear statement of state responsibility, however, this precedent has not been decisive in Colorado's fiscal equity lawsuits, and the tension between local control and greater state funding has persisted. In its amicus brief on behalf of the *Lujan* defendants, the state argued that "establishment

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[4] *See* Terry N. Whitney, *Voters and School Finance: The Impact of Public Opinion*, publication of the National Conference of State Legislatures (1993) at 29.

[5] COLO. CONST., Art. IX, § 2.

[6] COLO. CONST., Art. IX, § 15.

[7] Wilmore v. Annear 65 P.2d 1443, 1437 (1939).

and maintenance" -- in other words, funding -- would logically imply control. It attempted to reconcile the conflict between the two constitutional clauses by suggesting that while the state has an "interest" in public education, it is bound not to interfere with the clear mandate for local control of instruction.[8] Others, however, have argued that the state has a duty, not a mere "interest," and thus must provide the funding to fulfill its obligation.

The value placed on local control by many Colorado leaders and voters cannot be overemphasized. In recent years, the Colorado legislature has debated measures such as home-school credits, tax credits for "stay-at-home moms," and vouchers,[9] while in 1996 Coloradans considered but defeated a proposed constitutional amendment guaranteeing the right of parents to "direct and control the upbringing, education, values and discipline of their children."[10] In sum, an analysis of a "thorough and uniform" education in Colorado remains incomplete without an evaluation of its relationship to "control of instruction" and funding. Both clauses play equally important roles in Colorado's fiscal equity litigation and in efforts to resolve the explicit tension between funding and control.

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[8] Brief of the General Assembly as Amicus Curiae, Addendum at 10, Lujan v. Colorado State Board of Education, 649 P.2d 1005. The notion of increased state funding clearly makes some legislators nervous about the loss of local control. In 1997, Representative Dave Owen remarked: "It's the Golden Rule: Them that got the gold makes the rules . . . . We like to micromanage up here [at the state capitol]. We'll tell them a lot more how to run their business [if we pick up the full cost]." *No Easy Answers on Tax Reform*, DENVER POST, April, 21, 1997 [hereafter *No Easy Answers*].

[9] *Education Funding Divides State. GOP Meets to Chart Own Agenda*, DENVER POST, Monday, January 12, 1998.

[10] NEW YORK TIMES, Thursday, November 7, 1996 at B7.

## *Colorado's Education Finance System*

The state of Colorado made its first direct financial contribution to public education in 1935.[11] Other sources of funding for public education in the state include local property taxes and grants from federal, state, and local governments for the support of special programs.[12] By 1977, local sources accounted for 58% of school funding, while the state provided 42%. The gap between local and state funding has continued to shrink since then. Today, state income and sales taxes account for 46% of public school funding, local property taxes and ad valorem vehicle taxes provide 48%, and federal sources supply the remaining 6%.

In Colorado, the state and the districts share the funding of operating expenses in public schools, but the districts alone fund capital expenditures.[13] This peculiar feature of the Colorado school finance system, combined with constitutional amendments capping taxes and spending, has made it difficult even for some wealthy districts to fund new building projects at a time when many districts are growing rapidly.[14] The General Assembly has examined the problem of capital funding several times but has declined to make any major structural changes. In 1996, the Legislative Council concluded that it would take $2.5 billion to address the capital

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[11] A practice upheld in Wilmore v. Annear, *supra*, note 7.

[12] Interim Committee on School Finance, A Brief History of School Finance in Colorado, Staff Summary of Meeting, July 12-13, 1993, at 3. *See also* Richard A. King & Terry N. Whitney, *The Colorado School Finance Story: Traditional Values Shape Legislative Reforms and Initiatives*, 20 J. EDUC. FIN 372, 373 [hereafter *School Finance Story*]; Education Commission of the States website, www.ecs.org.

[13] One exception is a "contingency reserve" fund, authorizing the state Board of Education to disburse funds to districts in emergencies. *See* Understanding Colorado School Finance 1996-97, Colorado Department of Education, www.cde.state.co.us / sfbroch.htm.

[14] Interview with Lee Combs, defense attorney, Hafer v. Colorado State Board of Education, April 1996. Mr. Combs cited the example of Cherry Creek, where efforts to raise funds for capital expenditures were denied by the voters. See discussion of Taxpayer's Bill of Rights, *infra*.

development needs of Colorado's school districts.[15]

Over the past three decades, Colorado's General Assembly has sought to find a balance between equity interests and the pressure to maintain local control. The three PSFAs it has enacted have ostensibly been driven by this goal. In 1973, the state legislature enacted its first school finance act based on the principle of district power equalization (DPE). Under such a system, the state guarantees that for each mill a district levies, that district will have a particular amount of revenue per pupil.[16] If a district cannot raise this amount through local tax effort, the state provides the remaining revenue. But while this provision raised per-pupil spending in Colorado districts that would not otherwise have met the guaranteed amount, it did not ensure either equality or equity, because property-rich districts could still raise far more than this amount on their own. For example, in 1977, South Conejos School District raised $5.90 per pupil, and thus was eligible for $26.02 per pupil in state equalization aid. Rangely School District, on the other hand, did not qualify for equalization aid but was able to raise $326.27 per pupil on its own. Moreover, these two districts still bore inequitable tax burdens regardless of state action; each mill levied in Rangely produced nearly ten times what each mill South Conejos produced.[17]

The state also set a property tax revenue limit for each district called the authorized revenue base (ARB). However, as a consequence of efforts to gain the support of affluent districts, the limits were set in a way that

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[15] Interview with Pete Mirelez, lobbyist for various school districts, November, 1996.

[16] In 1977, this component guaranteed each district would have at least $31.92 per pupil for each mill levied. The districts that could raise this amount on their own were ineligible for the state equalization guarantee.

[17] *See School Finance Story, supra* note 12, at 373-375; Kenny L. Ayers, *Colorado's Public School Financing: Constitutional Issues*, 59 U. COLO. L. REV. 149 (1988); Carol Huber, *The Constitutionality of Colorado's School Finance System*, 50 U. COLO. L. REV. 115 (1978).

mirrored existing inequalities in local property wealth.[18] In addition, all districts regardless of wealth were provided with a minimum guarantee of $10 per mill in state funds, an amount that increased each year. Research on the impact of Colorado's district power equalization system found that it did not significantly change the inequities in per-pupil spending or the effect of local property wealth on available resources.[19]

In short, the 1973 PSFA introduced into the public school finance system several mechanisms designed to reduce disparities in funding, but it did not eliminate others that worked directly against equalization. Parents and schoolchildren unhappy with this compromise brought suit.

## LITIGATION AND SCHOOL FINANCE REFORM

### *Lujan v. Colorado State Board of Education*

In August 1977, 68 schoolchildren from 16 districts brought a class action suit alleging violations of the federal and state equal protection guarantees and of the Colorado Constitution's guarantee of a "thorough and uniform education." Their complaint stated that:

> Spending disparities among school districts, to the extent that they are caused by differences among districts in fiscal ability to raise revenue for education, are without any legitimate educational justification and result in unequal educational opportunities being afforded to Colorado schoolchildren.[20]

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[18] Richard A. King & Terry N. Whitney, Colorado School Finance Policy Issues: Past and Current Reform Efforts 2. Paper presented at the American Education Finance Association Conference, March 1994.

[19] *Id.*

[20] Complaint at ¶ 1, Lujan v. Colorado State Board of Education, 649 P.2d 1005.

The *Lujan* complaint described the ways in which the state finance system gave certain districts the ability to provide "more and better educational opportunities, material advantages and facilities to students in their jurisdictions than are provided by other school districts in the state."[21] The complaint also argued that certain districts "lack any meaningful local control over the amount of money being spent on their children's educations."[22]

The *Lujan* plaintiffs succeeded at the trial level. In 1982, however, the Colorado Supreme Court reversed the trial court in a 3-3-1 ruling, with the swing vote provided by an explicitly reluctant special concurrence.[23] In its decision, the Colorado Supreme Court considered whether the state ought to provide equal educational opportunities and, if so, whether this meant that the PSFA must ensure equal amounts of funding among districts. The court answered both questions in the negative, holding instead that a "thorough and uniform" education was "available through 'state action' in each district."[24] The court did acknowledge that the finance system was "not without fault," but suggested that the job of fixing that system should fall to the General Assembly.[25] The court also held that the 1973 PSFA was rationally related to a state interest: fostering local control. Taxing local property, the court argued, provided not only funding for public education, but also a means of ensuring that "the local citizenry direct the business of providing public school education in their district."[26]

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[21] *Id.* at ¶ 42.

[22] *Id.* at ¶ 40.

[23] By Justice Erickson. *Id.* at 1025. (Justice Quinn, who had been appointed to the Colorado Supreme Court by the time the *Lujan* appeal reached this court, did not participate in the case, having ruled on it at the trial level.)

[24] *Id.*

[25] *Id.* at 1018.

[26] *Id.* at 1021.

The concurrence and dissents in *Lujan* provided the seeds for a future legal challenge to Colorado's school finance system on the basis of inadequacy. In his special concurrence, Justice Erickson qualified his agreement with the majority's holdings by drawing attention to two ideas: first, that the principle of adequacy is a more appropriate basis for a school finance system than that of equity, and second, that the locus of responsibility for the financial maintenance of the public schools indeed resides in the legislature.[27] The dissents in *Lujan* noted several additional avenues that might be open to future plaintiffs. These included the idea that the plaintiffs had suffered an absolute deprivation of an important interest because of the inequities that arose from Colorado's levy and bond limitations, and the notion that low-wealth districts lack meaningful local control.[28]

In sum, then, the Justices of the Colorado Supreme Court agreed on one thing: the Finance Act needed fixing. Deference to separation of powers principles and to the idea of local control stopped them short of ordering it fixed, but the opinion raised important questions about the extent to which inequity was permissible as a necessary consequence of local control. These questions would not go away.

Despite the plaintiffs' loss in *Lujan*, the case brought pressure on the General Assembly to address some of the persistent inequities in the school finance system. The subsequent revisions to the 1973 PSFA made some gestures toward greater equity, most significantly by lowering the minimum guarantee of funding for each district.[29] Nonetheless, this change failed to eliminate existing disparities, since the minimum guarantee continued to provide funding for all districts regardless of wealth. While the Assembly's changes clearly responded to some of the concerns expressed by the

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[27] *Id.* at 1025-1028.

[28] Justice Dubofsky also agreed with Justice Lohr's assertion in his dissent that the entire public school finance system should be declared unconstitutional. *Id.* at 1030, note 1, 1039.

[29] Ayers, *supra* note 17, at 156.

plaintiffs in *Lujan,* none of them effectively addressed the problem of low-wealth districts' already high tax levy rates and widespread inability to provide funds for long term capital outlays.[30] In other words, these revisions did not fundamentally change the existing school finance system.

While these changes were being made, Colorado voters approved an amendment to the state constitution that had a subtle but pronounced effect on districts' ability to raise education funds locally. The Gallagher Amendment imposed a uniform mechanism for determining property tax revenues based on assessed valuation -- rather than market valuation -- of property in a district.[31] Assessed valuation yields far lower revenues in districts with high growth and large amounts of residential property, a description that fits a great many Colorado districts. In addition, the Gallagher Amendment sets the proportions of residential and commercial property tax revenues statewide at 45% and 55%, respectively, and the General Assembly adjusts its formulas every two years to maintain this proportion. In the years since the passage of the amendment, the value of residential property in Colorado has soared, meaning that in order to retain that 45% share, residential assessment rates have dropped steadily, from 18% in 1986 to 10.4% in 1998.[32]

Proponents of the amendment hailed it as a firm control on property taxes and government spending, and the strong support for these controls helped the amendment survive a legislative challenge in 1997.[33] While

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[30] *Id.*

[31] COLO. CONST., Art. X, § 15 (as amended in 1982).

[32] Michelle Dally Johnston, *Property Tax Relief Proposed*, DENVER POST, February 5, 1998.

[33] See discussion of Norton-Anderson proposal, *infra.* Several persons interviewed for this article suggested that the complexity of school finance poses the greatest obstacle to a truly widespread dialogue on property taxes, spending limits and school finance. Combs Interview; Interview with Deborah Fallin, Colorado Education Association, July 1998; Interview with William Thro, Education Division, Office of the Attorney General, June 1996. *See also* Dean Damon, *Dueling Rules Hurt Schools,* DENVER POST, March 29, 1998.

Gallagher's relationship with school funding is more complicated, the amendment has clearly made it more difficult for individual districts to raise money for their schools. One superintendent has noted that if property levies were simply based on market value, his district would have enough revenue to meet its schools' budgetary needs.[34] In recent years, the substantial population growth in Colorado has only exacerbated this problem, as dropping assessment rates create a smaller pool of local funds with which to provide resources for an ever-increasing number of students.[35]

### *Hafer v. Colorado State Board of Education*

Despite the revisions to the 1973 PSFA, many local schools were still frustrated by the lack of resources available to them, leading to a second legal challenge only five years after the *Lujan* decision. Plaintiffs in *Hafer*, filed in 1987, alleged a denial of adequate -- rather than equal -- educational opportunities under the revised 1973 PSFA.[36] They argued that the finance system failed to meet many students' educational needs and undermined local control, violating the state equal protection clause and the "thorough and efficient" clause of the state constitution.[37] To tackle the problem of *stare decisis*, plaintiffs drew attention to Justice Erickson's concurrence in *Lujan*, in which he had stated that the 1973 PSFA "barely" met constitutional standards, as well as to a statement in the majority opinion that the factual setting of the case was critical to a judgment about constitutionality. The factual circumstances in 1987, argued the *Hafer* plaintiffs, warranted another review of the Act.

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[34] Interview with Mike Kinser, Superintendent, Adams District 12, November 1996.

[35] Johnston, *supra* note 32.

[36] Hafer v. Colorado State Board of Education, No. 87-CV-2216 (D. Denver 1987).

[37] Complaint at ¶ 22(a)-(d), Hafer v. Colorado State Board of Education.

The *Hafer* plaintiffs vigorously denied making any argument in favor of equal expenditures, asserting instead that the funding system should provide revenue according to students' educational needs.[38] Their complaint also included a rough definition of a "thorough and uniform" education:

> Although equal spending per pupil is not required, the State is obligated to provide sufficient teachers, educational programs, support staff, physical facilities, texts, supplies, transportation and other necessities of public education to ensure a thorough and uniform education for every Colorado child.[39]

Plaintiffs drew particular attention to the problem of funding physical facilities solely through local property taxes and asserted that the legislature had repeatedly failed to fund certain categorical programs created for students with special needs.[40]

To counter the defendants' traditional identification with the interests of "taxpayers," the *Hafer* plaintiffs also included a separate taxpayer class, alleging that the finance act unfairly allocated the state's tax burden since low-wealth districts often have higher tax rates yet yield lower revenues than wealthy districts. Such a system, they argued, denied poorer districts any real local control and violated the "Uniform Taxation" clause of the state constitution. In combining the claims of both classes, plaintiffs' attorneys attempted to cast the interests of schoolchildren and taxpayers not only as complementary but as inseparable. This strategy also presented another way to pose the issue of local control by asking whether taxpayers in districts with inadequate resources exerted any real control over providing their children with an adequate education.

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[38] *Id.* at ¶¶ 9-10.

[39] *Id.* at ¶ 2.

[40] *Id.* at ¶ 5.

Defendants brought a motion to dismiss, which was granted in part and denied in part by the Denver District Court.[41] The court found, in short, that *Lujan* had settled the question of uniformity, but not that of thoroughness, leaving open for trial the question of whether the schoolchildren plaintiffs were "being denied an opportunity to be educated in the public schools."[42] The court granted the motion to dismiss the equal protection claim but denied the motion to dismiss the taxpayer plaintiffs' allegations of violations of the due process and "Uniform Taxation" clauses.

At the same time, the political momentum behind revising the school finance act was reaching a climax. In 1987, a legislative Committee on School Finance held a series of hearings in which participants identified a number of pressing concerns regarding school finance. Among these were the continued tension between state and local control, difficulties in funding capital projects, funding for at-risk students, the state's over-reliance on local property taxes for school funding, and the complexity of school finance formulas that prevented the general public from understanding the issues.[43] At the same time, the impending *Hafer* suit and publicity surrounding it exerted pressure on the General Assembly to revise the finance system.[44] This pressure culminated in an overhaul of the 1973 PSFA before *Hafer* went to trial. The plaintiffs, recognizing that the legislature's extensive revisions of the finance system responded to many of their concerns, decided to drop their case.[45]

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[41] Orders Regarding Defendants' Motion to Dismiss, Hafer v. Colorado State Board of Education.

[42] *Id.* at ¶ 2 (emphasis added).

[43] *See* Committee on School Finance, Staff Summary of Meeting, July 22-24 and October 26-29, 1987.

[44] Combs interview.

[45] Interview with Gregory Kanan, plaintiffs' attorney, Hafer v. Colorado State Board of Education, April 1996; Interview with Bill Rosser, Executive Director, Colorado Lawyers' Committee and plaintiffs' attorney, Hafer v. Colorado State Board of Education, April 1996.

Similarly, one attorney for the plaintiffs in the pending *Giardino* case has suggested that a sufficient response from the General Assembly might lead them to drop their case. *Needy*

## *The 1988 Public School Finance Act*

The 1988 Public School Finance Act aimed to meet two principal goals, both clearly influenced by the testimony presented before the Committee on School Finance: the establishment of a foundation amount that responded to the real financial needs of districts, and the creation of a concrete, understandable finance system.[46] The Act replaced the 1973 PSFA's version of district power equalizing with a foundation plan using a statewide per-pupil base amount. The Act tried to balance "local control" and equity goals by moving toward a uniform tax levy in all districts while providing taxpayer relief by reducing the burden on property taxes. It guaranteed the per-pupil foundation amount, with the state supplying the difference between this guarantee and the amount raised locally through property taxes.

In response to concerns regarding economies of scale and cost of living differences, the 1988 PSFA classified the state's districts into eight "setting categories."[47] These categories were supposed to reflect demographic similarities among districts. Although the setting categories had emerged out of extensive hearings and reflected an attempt to respond to widespread concerns, they met with strong opposition from those who charged that the categories did not adequately address student needs.[48] Moreover, inequities persisted, in part because of a hold-harmless provision

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*Schools Seek a Lifeline, supra* note 2.

[46] *School Finance Story, supra* note 12, at 376-377.

[47] These included: (1) core city (Denver), (2) Denver metro (suburban districts surrounding Denver), (3) urban/suburban (population in excess of 30,000), (4) outlying city (population between 7,000 and 30,000), (5) outlying town (population between 1,000 and 7,000), (6) rural (population center of less than 1,000), (7) recreational (high property values and cost of living), and (8) small attendance (pupil enrollment of less than 150). *Id.*

[48] *Id.* at 377. Many districts also felt they had been assigned to the wrong category. Interview with Deb Godshall, Policy Analyst, Legislative Council, April 1996; Combs interview.

and the length of time it took to phase in a uniform tax levy. To make matters worse, the legislature never fully funded the 1988 PSFA.[49] In 1991, a coalition of teachers, administrators, school board members, and parents pressured the General Assembly to pass a tax hike to fund the Act, but their efforts were unsuccessful.[50]

### *The Taxpayer's Bill of Rights*

As discontent grew about the 1988 PSFA and the legislature's failure to fund it, the passage of the Taxpayer's Bill of Rights (TABOR)[51] in 1992 exacerbated these problems by making it virtually impossible to meet the PSFA's mandate. This amendment to the state constitution has been called "the most restrictive revenue and spending limit placed upon state and local governments in the nation"[52] and is yet another example of the strong sentiment in favor of smaller government and local control in Colorado.

Although one scholar has called TABOR "an 1800-word masterpiece that very few voters read and literally no one understood,"[53] the stated goal of the amendment is clear: "Its preferred interpretation shall reasonably restrain most the growth of government."[54] TABOR limits state spending increases to the rate of inflation plus population growth and local spending

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[49] *See, e.g., School Financing a Quandary*, DENVER POST, January 11, 1993.

[50] *Tax Hike Urged to Pay for School Reform Act. Parents, Teachers, Others Band Together*, COLORADO SPRINGS GAZETTE, September 10, 1991 [hereafter *Tax Hike Urged*].

[51] COLO. CONST., Art. X, § 20 (adopted in a general election on Nov. 3, 1992 and also known as Amendment One or the "Bruce Amendment").

[52] James Jacobs, *In 5 Years, Is the State Better Off?* DENVER POST, March 29, 1998.

[53] Gene R. Nichol, *Constitutional Judgment*, 91 MICH. L. REV. 1107, 1118 (1993).

[54] COLO. CONST., Art. X, § 20(1).

increases to population growth plus the change in property values.[55] It also requires that voters approve any new tax, tax increase, mill levy increase, increase in the assessment ratio for a class of property, or any change in tax policy that results in a net revenue gain. Voters must also approve multi-year financial obligations such as the issuance of new revenue bonds.

Before TABOR was passed, the Legislative Council predicted that per-pupil spending would drop by 18.3% if the measure passed.[56] The Colorado Association of School Boards warned against so complicating the ability to fund public works and services that "[t]he cost of the election itself could negate a revenue increase approved by the voters."[57] Colorado voters approved TABOR despite these warnings. Some have questioned whether many voters even considered the consequences for school finance. Like the Gallagher Amendment, TABOR enjoys a clear, brief, and attractive description: lower taxes and smaller government. According to one analysis, "[f]ew arguments on either side of the issue stressed implications for the state's public school children; the battle was fought in terms of government efficiencies."[58]

The same year that Colorado's voters passed TABOR, they rejected Governor Romer's "Children First" initiative, a proposal to raise sales taxes by 1% (from 3% to 4%) in order to close a shortfall in school funding of $168 million.[59] Governor Romer traveled the state trying to garner support for the measure, meeting with parents and educators to warn them of an

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[55] *See School Finance Story, supra* note 12, at 380-382; Nichol, *supra* note 53, at 1118-1119; Jacobs, *supra* note 52.

[56] Even though the state's revenue projections improved and the General Assembly allocated more funds than expected to education, the Colorado Department of Education nevertheless reported a 4% reduction in per-pupil spending in 1994.

[57] *School Finance Story*, *supra* note 12, at 381, quoting *Election '92 Fact Sheet: Amendment #1 -- Tax Limitation* (Colorado Association of School Boards).

[58] *Id.*

[59] *School Finance Story* at 27-32.

impending 12% cut in funding for most school districts. Although "Children First" sought only to restore funding to then-current levels rather than to raise the level of support, 56% of Coloradans voted against it.

Once again, the pressure to revise the finance system itself began to build. The Colorado Lawyers' Committee, which had brought both the *Lujan* and *Hafer* lawsuits, made known its renewed scrutiny of school finance issues in light of TABOR.[60] Another legislative Committee on School Finance met in 1993, held hearings, and recommended new changes to the 1988 PSFA.[61] Among the participants in those hearings, which took place all over the state and gathered extensive testimony, were educators, districts, parents, community organizations and parental groups, businesses, the Colorado Association of School Boards (CASB) and the Colorado Association of School Executives (CASE).[62] Not surprisingly, the recurring theme of these hearings concerned the potential effects of TABOR on school funding and the need to balance tax and fiscal policy with school finance decisions. The result was the 1994 PSFA.

### *The 1994 Public School Finance Act: A Revised Foundation Plan*

The 1994 PSFA maintained the 1988 Act's foundation plan but instituted several measures for achieving greater equity. The Act eliminated the setting categories and added four cost-adjustment factors in an effort to respond to each district's individual characteristics and needs.[63] In addition,

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[60] *Committee Set to Mount Fight for School Funds*, DENVER POST, February 16, 1993.

[61] Interim Committee on School Finance, Report to the Colorado Legislative Council, December 1993.

[62] Mirelez Interview.

[63] The cost-adjustment factors are: district size, cost-of-living, personnel costs, and the presence of at-risk students. This was the first time that the state provided at-risk funding, an

it changed the calculation of the pupil count, basing it on enrollment rather than attendance.

In an effort to promote equity, the 1994 PSFA continued the phase-in of property tax leveling and required districts that could raise more than the total program funding amount to use local revenue to pay for programs that would otherwise receive state categorical funding.[64] However, the 1994 Act retained a hold-harmless provision and a minimum guarantee, both of which undermined the equity provisions.[65] The Act also increased the percentage of additional funding each district may raise through voter-approved property taxes.[66] Importantly, the 1994 PSFA failed to address the inability of local districts to fund their capital expenditures, for which the districts were still fully responsible. This issue -- and the impact of TABOR and the Gallagher Amendment -- would begin to take center stage in the years that followed.

## A "NEXT WAVE" IN COLORADO SCHOOL FINANCE LAW AND LITIGATION

### *The Norton-Anderson Proposal*

During the 1997 legislative session, the General Assembly debated (albeit briefly) an extensive overhaul of Colorado's school finance system.

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issue that was extensively debated at the hearings of the Committee on School Finance. Godshall Interview.

[64] These programs include: exceptional students' education, vocational education, pre-school programs, English-language proficiency, and transportation. *See School Finance Story*, *supra* note 12, at 377-380; Understanding Colorado School Finance 1996-97, *supra* note 13.

[65] The Act also expanded the local share of revenue to include the specific ownership tax (motor vehicle registration fees) which, according to a study by the Legislative Council, had enriched some districts with up to $853 of unequalized per-pupil funding. *Id.*

[66] To 20%, up from 15% in the 1988 PSFA. *Id.*

House Majority Leader Norma Anderson and Senate President Tom Norton, both Republicans, proposed a bill to end the reliance on local property taxes for public school funding, and instead to fund schools through an increase in the sales and corporate income taxes.[67] An accompanying constitutional amendment would have effectively eliminated the Gallagher Amendment, freezing the assessment rate at 9%.[68] The Norton-Anderson bill was an attempt to respond to a key problem in the wake of TABOR and the Gallagher Amendment: property taxes had not kept pace with inflation or population growth, and many districts could not possibly meet their construction and capital maintenance needs. Critics charged, however, that the proposed system would provide sufficient revenue only when the economy was booming, and not during recessionary periods.[69]

Perhaps more important than the bill itself was the recognition it sparked of the need for a statewide public dialogue on the question of school funding. "School finance reform . . ." read one editorial in the *Denver Post*, "had a late start and is too important, and too complex, for the hasty negotiations that characterize the final two weeks of the [legislative] session."[70] Others concurred, noting that "[I]nformal talks and capitol hearings can't substitute for full public hearings in a wide range of Colorado communities."[71] Once again, much of the debate on the proposed overhaul focused on local control -- and, in particular, the connection between control and funding. One news report listed the "vital questions" that must be answered before the passage of such a bill, among them: "Will replacing locally derived property taxes with state-collected taxes to fund public

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[67] The ultimately unsuccessful bill, H.R. 1347, would have increased the sales tax by over 50%, increased the corporate income tax from 5% to 11%, eliminated corporate tax credits, and reduced the assessment rate for personal property.

[68] *No Easy Answers, supra* note 8.

[69] *Tax Bill Met with Caution. Lawmakers Aim to Boost School Aid*, DENVER POST, April 9, 1997.

[70] *Legislative Endgame*, Editorial, DENVER POST, April 23, 1997.

[71] *Tax Bill Met With Caution, supra* note 69.

schools end local control?"[72] Another editorial asked, "Sure, local control of schools would remain in the state constitution, but if the state is paying the piper, would local control continue in fact?"[73]

### *Giardino v. Colorado State Board of Education*

In 1998, Colorado saw the filing of a third school finance lawsuit. The *Giardino* suit, filed by parents, students and taxpayers in a number of rural counties, combines *Hafer*'s emphasis on adequacy and the inclusion of a taxpayer plaintiff class with a direct challenge to the state's practice of making local districts fund construction and capital maintenance needs.[74] In this way, the *Giardino* plaintiffs have attempted to tie the somewhat abstract claim of inadequate educational opportunity to more concrete claims concerning dilapidated buildings and facilities. Plaintiffs also contend that the current capital funding system does not promote local control but actually subverts it.[75] They argue that the current system:

> does not depend on the decision by taxpayers residing in one district to tax *themselves* at a higher rate than that elected by taxpayers in another district, but rather involves a decision by the *State* that the taxpayer class members must submit to a

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[72] *No Easy Answers*, *supra* note 8.

[73] *A Tax Bill that Needs Killing*, Editorial, ROCKY MOUNTAIN NEWS, April 13, 1997. Interestingly, some who commented on the Norton-Anderson proposal took a more cynical view of "local control." "'For all practical purposes, local control . . . is gone,' observed Dick Weber, Executive Director of the Colorado Association for School Board Executives. On a more practical note, Representative Vicki Agler (R-Anderson), noted that 'Anderson contends that local control is a myth anyhow... [but if] we're going to change [how schools are funded], we need to perpetuate that myth.'" *Id.*

[74] Giardino v. Colorado State Board of Education, No. 98 CV 246 (D. Denver 1998).

[75] Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss 19, Giardino v. Colorado State Board of Education.

> heavier tax burden than that borne by similarly situated taxpayers in other districts in order to meet the State's obligation to provide minimally adequate educational facilities.[76]

This argument is based not only on many districts' inability to raise enough money for capital funding, but also on the very existence of a state regulatory scheme that limits local control. As examples, plaintiffs cite statutes that establish standards for school building construction and others that limit the amount of school districts' bonded indebtedness.[77]

Defendants brought a motion to dismiss the various claims in the case, charging that local control is a legitimate state purpose (a claim not contested by plaintiffs). They also argued that the plaintiffs' claim that the school finance system subverts local control, and thus renders the system unconstitutional, had already been rejected in *Lujan*. In February 1999, three of the four claims in the motion were rejected by the Denver District Court; only the claim of the taxpayer plaintiff class was dismissed. The case will now proceed through discovery, with a trial perhaps taking place late in the year 2000.

Although *Giardino* primarily concerns capital funding, some have suggested that the implications of the case may be wider. One advocate on the issue, Superintendent Peg Portscheller of the Lake County school district, has suggested that the issue of capital funding cannot be addressed in isolation, since the school finance system as a whole is undermining adequacy.[78] The trial, then, may present yet another opportunity for school funding advocates to challenge Colorado's entire education finance system,

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[76] *Id.* at 33-34.

[77] *Id.* at 19-20.

[78] Interview with Peg Portscheller, Superintendent, Lake County School District, March 29, 1999. Ms. Portscheller has been a leading spokesperson on behalf of plaintiff districts. Lake County has some of the most pronounced construction and maintenance needs in the state.

as well as TABOR and the Gallagher amendment. Ms. Portscheller calls the combined effect of these amendments the "real frustration" in trying to achieve adequacy, and she suggests that *Giardino* may be "a judicial opportunity to push against those amendments. The legislature has a constitutional obligation and the amendments really hamper their ability to fulfill that obligation."[79]

### *Recent Legislative Developments and Referendum B*

At the same time, recent legislative events have further pushed the capital construction issue into the public eye. During the 1998 session, the General Assembly signed into law a bill establishing a school construction and renovation fund to provide matching construction funds to districts in need.[80] In the fall of 1998, Coloradans considered a measure that would have earmarked a large part of the state's budget surplus for public education. Referendum B proposed spending $100 million of the state's projected $536 million budget surplus on building and construction needs for schools; it would have also committed the state to that level of spending for each of the next four years.[81] In addition, the referendum would have earmarked $100 million annually for transportation, largely highway construction, for a total of $1 billion in spending over the next five years. Under TABOR, voters must approve spending any budget surplus; otherwise, the money must be refunded to the taxpayers. In September, two Republican legislators introduced a bill providing for the refund which included specific figures comparing the refund those in different tax brackets would receive if the referendum passed and if it was defeated.

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[79] *Id.*

[80] H.B. 98-1231. *See also Romer Signs School Measure. New Law Ensures Accountability*, DENVER POST, Thursday, May 28, 1998.

[81] The issue was sponsored by Republican legislators Norma Anderson and Tom Norton, the same lawmakers who sponsored the 1997 bill proposing an overhaul of the education finance system.

Referendum B did stir up some public debate regarding taxes, school funding, and local control in Colorado. At a September rally on the steps of the state capitol, backers of the ballot issue faced a group of rowdy hecklers who called Referendum B a $1 billion tax increase. In the following months, supporters claimed there was an inherent logic in the proposal: the referendum would use the money generated by Colorado's population and business growth to fix the problems created by that growth. Critics, however, characterized the measure as vague because it did not name particular schools or projects that would receive additional funds.[82] Despite polls showing that 72% of voters supported the referendum, the proposal was soundly defeated, with 62% voting against increased state spending in favor of a greater tax refund. In hindsight, some have suggested that the education community did not do enough to support the proposal.[83] The fact that Referendum B asked voters to approve increased *state* spending may also have been a key factor. Since 1992, 325 of 356 ballot propositions to spend local surplus revenue have been approved by voters, including 15 of 19 in 1998.[84] In light of the defeat of Referendum B, these numbers suggest that Colorado voters are much more comfortable with government spending by local officials -- perhaps another way to understand the state's tradition of local control.

Also in November, Coloradans elected Bill Owens, the state's first Republican Governor in 24 years. Although Owens campaigned against increased state spending on education, he has recently proposed using 40% of the state's $2.6 billion settlement with the tobacco industry on third-grade reading programs and school construction projects. Owens' plan would create a $380 million "21st Century Fund" to provide grants and low-interest

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[82] Ricky Young, *Surplus Use Booed at Rally*, DENVER POST, September 23, 1999; Roy Romer & Norma Anderson, *Keep Some AND Pay for Growth*, DENVER POST, October 25, 1998; Jon Caldara, *Vote 'No'; It's Your Dough*, DENVER POST, October 25, 1998. Supporters also pointed out that voters would still receive a tax refund for 1998.

[83] Fred Brown, *Only Surprise: Referendum B*, DENVER POST, November 9, 1998; Damon Interview.

[84] Brown, *supra* note 83.

loans for construction and repairs; the fund's board, whose membership has not been determined, would decide which districts received the grants and loans. Owens has stated publicly that he hopes the fund will head off the challenge to the state aid system posed by *Giardino*.[85] Critics, however, have been quick to point out that even if this money is distributed fairly, it would only be a small first step toward solving the enormous capital needs in some Colorado districts.[86]

## PUBLIC DIALOGUE ON SCHOOL FINANCE

Coloradans seem to have engaged in several parallel dialogues on school finance which may be moving toward greater coordination, although public discussions on related issues have not always addressed the implications for school finance. This is particularly true of the public dialogue surrounding measures such as the Gallagher Amendment and TABOR, where the discussion has largely focused on cutting taxes and not on the implications for public school funding.

One dialogue on school finance has taken place at the Colorado Lawyers' Committee (CLC), a non-profit organization with a membership of about 1,200 lawyers whose work includes impact litigation and advocacy efforts on issues such as foster care, child welfare, voting rights, hate crimes, and education.[87] William Thro of the Education Division of the office of the Attorney General has called the CLC the most active force behind fiscal

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[85] Mark Obmascik, *Schools May Get Tobacco Money*, DENVER POST, February 11, 1999; Mike Soraghan, *Panel Backs Spending Tobacco Money on Health*, DENVER POST, February 12, 1999.

[86] Portscheller Interview. Douglas Bruce, author of TABOR, has suggested that the money be refunded to taxpayers. Soraghan, *supra* note 85.

[87] Rosser Interview; *see also Gratitude for (some) Lawyers*, DENVER POST, September 22, 1992 (describing the organization).

equity efforts in Colorado.[88] The CLC brought the *Lujan* lawsuit after it was approached by the Chicano Education Project, an organization that had been active lobbyists and litigants on bilingual educational issues, for help on its own efforts to address the issue of school finance.[89] The CLC was also behind the *Hafer* lawsuit and now provides the lawyers for the *Giardino* plaintiffs.[90] The CLC enjoys a solid reputation in the General Assembly for building bipartisan coalitions. Indeed, prior to bringing both *Lujan* and *Hafer*, the CLC organized task forces for building consensus and gathering views and information on school finance, an effort which succeeded in ensuring that no school district opposed the plaintiffs in *Hafer*.[91] The *Hafer* task force met weekly for a year, hearing from superintendents, representatives from school districts from all over the state, legislators, and experts on school finance and taxation from Colorado and around the nation. The attorneys for the *Hafer* plaintiffs successfully communicated to a sufficiently broad audience the idea that they were seeking not to "redistribute" funds but to "increase the pie," thus ensuring broad-based support for their lawsuit.[92]

Various other coalitions have at different times responded to perceived needs in the area of school finance. As mentioned earlier, a legislative Committee on School Finance held hearings and issued recommendations

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[88] Thro Interview.

[89] The Chicano Education Project already had experience in using both the judicial and legislative processes for change. In 1975, the combined pressure of a lawsuit (Otero v. Mesa County Valley School District No. 51) and a lobbying effort by the Project and others led to the passage of the Colorado Bilingual-Bicultural Education Act. *See* MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS 147-196 (1982).

[90] Rosser Interview; *see also Learning to be Colorblind*, DENVER POST, December 10, 1997.

[91] Kanan Interview; Rosser Interview.

[92] Kanan Interview.

that led to the overhaul of the PSFA in 1988.[93] In 1991, a coalition of teachers, administrators, school board members, and parents sought unsuccessfully to persuade the General Assembly to pass a tax hike in order to fund the 1988 PSFA.[94] At a press conference, members of this coalition cited a telephone survey of 805 Colorado voters, which found that 71% would be willing to pay higher taxes to provide increased funding for public schools, an optimistic finding called into question by the subsequent defeat of Governor Romer's "Children First" effort and the success of TABOR.

In 1994, another coalition sought increased funding for public schools. The Coalition for a Thorough and Uniform Education, which consisted of nine school districts serving 130,000 students, issued a report on the eve of that year's legislative discussions regarding the proposed rewrite of the school finance act. The report called for greater equity and adequacy in school funding.[95] Among other proposals, the Coalition suggested caps on administrative and support-system spending, reductions in schools' social service responsibilities, and the implementation of a uniform statewide accounting system to allow easier comparisons among districts' spending. The report stated that the Coalition's districts, which received about $3,800 per pupil (well below the state average at the time), were willing to show that districts spend tax monies efficiently, contrary to popular perceptions.

Two years later, the Coalition reorganized and changed its name to the Colorado School Finance Project.[96] The Finance Project's current membership includes the state associations of school boards and school executives, the Colorado Department of Education, the Colorado Education

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[93] *See* Committee on School Finance, Staff Summary of Meeting, July 22-24 and October 26-29, 1987.

[94] *Tax Hike Urged*, *supra* note 50.

[95] Godshall Interview; *see also Report Tackles Ideas for School Funding. Districts Ask Legislators to Increase Spending on Education*, COLORADO SPRINGS GAZETTE, January 11, 1994.

[96] Interview with Don Saul, Superintendent, Thompson Valley School District and Chair, Steering Committee, Colorado School Finance Project, December 17, 1998.

Association, the Colorado BOCES Association and various school districts, PTAs, superintendents, lobbyists and lawyers. Among the Finance Project's goals is the development of grassroots support, local advocacy, and common legislative agendas for long-term, adequate investment in the state's public schools. The group has also sought to collect and analyze reliable, accurate data on school funding and the effect of tax policies on the resources available to schools.[97] According to members of the Finance Project, the lack of such data has historically been a primary problem in Colorado's school finance dialogue, since all sides play with the numbers to suit their political purposes, and the complexity of the school finance system makes it nearly impossible for the general public to evaluate and understand the effects of different funding mechanisms.[98]

In particular, the Finance Project has used the state's own data on school district finances to demonstrate the impact of legislative and tax policies on district resources, something no one else in Colorado does.[99] For the past few years, the Finance Project has identified a "spending gap" in per-pupil spending across the state. This research establishes the amount by which per-pupil funding *should* have increased in recent years based on factors such as inflation and enrollment; it then demonstrates the ways in which TABOR, the General Assembly's failure to fully fund the PSFA, and other legislative policies have caused actual per-pupil spending to lag behind this predicted amount. In 1998, when the Finance Project presented its findings to the General Assembly, no one disputed them.[100] The term "spending gap" has caught on in discussions of school finance, providing a useful shorthand for describing the problems facing many of the state's school districts.

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[97] Most of this research is conducted with the help of Augenblick & Myers, the Denver-based consulting firm which has extensive experience in education finance.

[98] Fallin Interview; Interview with Allan Hentschel, Colorado School Finance Project, July 1998.

[99] Interview with Dean Damon, Director, Colorado School Finance Project, January 19, 1999.

[100] Fallin Interview.

With the filing of the *Giardino* suit, the School Finance Project has increased its focus on the problem of capital funding. In addition to meeting with members of the CLC to share expertise on capital funding, the Finance Project has provided other support to the *Giardino* attorneys and helped to identify plaintiffs. Working with local business groups such as the Denver Chamber of Commerce, the Finance Project has also worked to exert pressure on the legislature to ameliorate funding inadequacies *before* the case goes to trial -- in other words, to raise a sense of legislative urgency.[101]

At the same time, the Finance Project has worked to promote a broad statewide dialogue on school funding reform. The organization serves as a means of collaboration for a number of interests -- such as superintendents, teachers and school board members -- and tries to help these groups advocate locally around a common statewide agenda of adequate school funding. In many districts, the Finance Project holds regular meetings with local school officials. With the help of the Greater Denver Chamber of Commerce, the Project has also convened regular meetings with local business groups. Expanding this dialogue to the broader community, however, has been frustrating. While the Project has convened a few large public meetings in southern Colorado, efforts to do so in other parts of the state have been less fruitful. The Finance Project's leadership believes that many Colorado residents do not yet see the problem of school finance as sufficiently urgent to become engaged in a meaningful dialogue. Dean Damon, the Project's Director, also points out that in the last five years, Colorado has made strides toward greater equity and the state's poorest districts have seen a significant increase in funding. The problem now, according to Damon, is "equalized inadequacy."[102]

In its efforts to expand the public dialogue, the Project has conducted focus groups aimed at crafting a message on school funding that will grab the attention of Colorado voters. The Project's leadership considers such a public dialogue absolutely critical to school finance reform, both in making

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[101] Saul Interview.

[102] Damon Interview.

school finance important to the state's taxpayers and in making legislators receptive to new approaches to school funding and tax policy. After the defeat of Referendum B, the Project also recognizes the need for stronger leadership in advocating for increased funding for education.[103] In addition, the Project is considering whether it wants to undertake a statewide campaign supporting an amendment to the state constitution providing that school funding must increase annually by at least the rate of inflation plus district growth. Such a campaign might, at the very least, provide the opportunity to raise public awareness and advance a meaningful dialogue on school funding across the state.[104]

## CONCLUSION

Despite a variety of obstacles, including strict limits on public spending and a pronounced desire for local control, the push for school funding reform continues in Colorado. Some have suggested that a general skepticism and lack of confidence in reform exists in Colorado, in part because of the sheer complexity of the issues. Nonetheless, the combined effects of two lawsuits have brought about some reforms to the state's school finance system, even without a major victory for plaintiffs. At the same time, there seems to be a growing consensus among advocates for reform that a statewide public dialogue on education finance is critical, and that the moment for such a dialogue may be near. Perhaps the latest legal challenge, with its focus on building construction and maintenance -- a tangible and pressing issue in many Colorado communities -- will prove to be the necessary spark for igniting this discussion.

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[103] Saul Interview.

[104] Damon Interview.